DATE: January 4, 1994
CASE NO. 90-ERA-10

IN THE MATTER OF

MANSOUR GUITY,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

Before me for review is the August 19, 1993, Recommended Order of Dismissal (R.O.D.) of the Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act, as amended (ERA), 42 U.S.C. § 5851 (1988). The ALJ recommended that the complaint be dismissed without prejudice and with one year's leave to file a motion to reopen within 30 days of the issuance of a "declaration of competence to litigate the case" issued by Complainant's treating psychologist. R.O.D. at 5.

1. Procedural history

In 1989, Complainant Mansour Guity filed two complaints alleging that Respondent Tennessee Valley Authority (TVA) included him in a reduction in force in retaliation for his engaging in activities protected under the ERA. The District Director of the Wage and Hour Division determined that the allegations in the complaints could not be substantiated and Complainant requested a hearing before an ALJ.

The ALJ scheduled a hearing for June 6, 1990. The parties jointly requested a continuance of the hearing because of

Complainant's mental condition, which has precluded his prosecution of this complaint and a related action in *Guity v. Tennessee Valley Authority*, Civ. No. 3-87-843, (E.D. Tenn.).

When the ALJ set a hearing for April 30, 1991, the parties again jointly moved for a continuance and waived the statutory time limits for a final decision in this matter. The ALJ granted

the continuance.

In September 1992, the District Court administratively terminated the related action with permission to move for reopening the case within 30 days of a declaration by a physician that Guity is competent to prosecute his case.

In February 1993, the Deputy Chief ALJ ordered the parties to show cause why the stay should not be lifted and this case set for hearing. Guity responded that a previous order "allowed this case to be held in abeyance until the federal court case is concluded. The complainant does not envision this going beyond the end of 1993." He asked that the case remain "in suspense" on the pending docket. Comp. Brief Pursuant to Order dated Feb. 17, 1993, at 2.

In response to a subsequent Order, TVA argued that Guity had not established his incapacity and noted that the ALJ could dismiss the complaint for failure to prosecute. Resp. Brief Pursuant to the April 13, 1993, Order at 2-3.

> The ALJ found that:
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> Although the Complainant's mental condition is an ameliorating factor, this matter cannot be continued indefinitely, especially since there has been no effort by the Complainant to establish a record showing why this case cannot go forward *as directed in the first Order to Show Cause*, or that it will soon be ripe for hearing. Counsel's assertions concerning the Complainant's condition are *not* evidence. (Emphasis in original).

May 19, 1993 Order at 4. The ALJ denied Guity's request to keep this matter in suspense, and afforded Guity 60 days to submit a physician's report stating that he is competent to participate in the prosecution of this complaint. *Id.* at 5. The ALJ further ordered that if such a physician's report was not submitted, he would issue a Recommended Order dismissing the complaint for failure to prosecute. *Id.*

Guity submitted the affidavit of his treating psychologist, who stated that Complainant was "emotionally not able to continue" prosecuting his complaint "without increasing his psychological problems," and opining that "[t]here is little question that [Complainant] *will* eventually be able to conclude his case with the Department of Labor against TVA." Affidavit of

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William Berez, Ph.D. (emphasis in original), attached to Complainant's Response to May 19, 1993, Order. Guity requested that this case remain open. *Id.*

2. The ALJ's Recommended Order of Dismissal

The ALJ noted that despite "counsel's optimistic assessments," no action progressing this matter toward hearing had occurred since prior to September 1990 and the psychologist's affidavit did not provide any reasonably foreseeable date when the hearing in this case might be held. R.O.D. at 4-5. He reasoned that TVA's "ability to prepare a defense may be hampered by continuing delay, the ERA whistleblower provision was meant to be an expedited proceeding, and this Agency has a responsibility to manage its docket so that matters do not drag on

indefinitely." R.O.D. at 4-5.

Accordingly, the ALJ recommended that the Secretary "dismiss the complaint *without* prejudice and with leave to file a motion to reopen within 30 days of Complainant's treating psychologist's declaration of competence to litigate this case." R.O.D. at 5 [emphasis in original]. The ALJ further recommended, *id.*,

> that the leave to file a motion to reopen be limited to one year from the date of the Secretary's order and be conditioned on the understanding that a granting of the motion is not [to] be a foregone conclusion but must be supported by argument and any appropriate evidence, and a showing that the psychologist's declaration of competence was not unduly delayed after the date of recovery. In addition, it is recommended that the Secretary hold that any such motion be filed with the Secretary (via the Office of Administrative Appeals), which then could determine whether any finding of fact by an administrative law judge is necessary or whether he could rule on the motion directly. Finally, in the interest of judicial finality, it is recommended that the Secretary hold that in the event a motion to reopen is not filed within one year of the date of the Secretary's order, the Secretary's order will automatically become a final order of dismissal *with* prejudice. [Emphasis in original]

3. The Show Cause Order and Responses

The Secretary issued an order to show cause why he should

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not issue a final order of dismissal conditioned according to the ALJ's recommended order. October 4, 1993, Order to Show Cause. TVA did not object to dismissal, but reserved its right to object if Guity subsequently filed a motion to reopen. TVA Response to Show Cause Order at 1. TVA argued that neither the ERA nor the implementing regulations provide for motions to reopen, and the Secretary has not adopted Fed. R. Civ. P. Rule 60(b) in ERA cases. *Id.* at 2. Alternatively, TVA argued that even if a reopening motion were authorized, Guity should be required to demonstrate that he has been mentally incompetent throughout this proceeding and that his attorney was unable to prosecute his complaint without his assistance, which was precluded by his incompetence. *Id.* Finally, TVA requested that any motion to reopen be filed no later than June 7, 1994, five years after Guity filed the initial complaint. *Id.* at 3.

Guity opposed TVA's limitation on the time period for filing a request to reopen and asked that he be permitted one year from the final decision to file such a request. Guity's Response to Respondent's Response to Order to Show Cause at 2.

4. Analysis

In the R.O.D., the ALJ assumes that I have authority to reopen final decisions issued in ERA cases such as this. Recently, in *Bartlik v. Tennessee Valley Authority*, Case No. 88-ERA-15, Secretary Order, July 16, 1993, the complainant moved for reconsideration of a final decision on the ground of material error, and I stated that "I have considerable doubt, . . . that in the absence of statutory authority, the Secretary has the authority under the Federal Rules of Civil Procedure to reconsider a final decision." *Bartlik*, slip op. at 3-4. In any event, assuming that the Secretary "has inherent authority to reconsider his decisions as any other agency," I denied the motion for reconsideration in *Bartlik*.

Here, there is no issue of a request for reopening on the ground of material error. Rather, under the procedure the ALJ recommends, the Secretary initially would dismiss this complaint without prejudice to Guity seeking to reactivate it within one year, if Guity's physician/psychologist certifies that he is able to prosecute his complaint. If Guity did not produce such a certification within one year, the dismissal would convert to one with prejudice. I find that the potential "reopening" outlined above is not similar to the type of reopening that was at issue in *Bartlik*. [1] Rather, the recommended provision for leave to seek reopening is a means to ameliorate the admittedly harsh sanction of dismissal with prejudice for failure to prosecute, as I explain below.

An administrative agency's power to control its docket is similar to that of a court. *Billings v. Tennessee Valley*

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Authority, Case Nos. 89-ERA-16, *et al.*, Final Dec. and Order, July 29, 1992, slip op. at 3. It is within the power of a court to dismiss for failure to prosecute where the plaintiff's mental incompetence has led to stagnation in the case. For example, a federal court properly dismissed for failure to prosecute notwithstanding a plaintiff's incompetence due to ill health documented by a psychiatrist, where "the case had been stagnant for over three years," and if plaintiff's request for another continuance were granted, the case "threaten[ed] to remain on the Court's docket indefinitely." *Mavy-Amenberg v. Marsh*, 1991 U.S. LEXIS 20919 (9th Cir. 1991), reported as Table Case at 942 F.2d 790.

As the ALJ recognized, whereas Guity's psychological condition is an ameliorating factor, the Department of Labor has the inherent authority not to allow this case to remain open in perpetuity. Although it is not necessary to show prejudice to the defendant as a basis for dismissal for failure to prosecute, *West v. City of New York*, 130 F.R.D. 522 (S.D.N.Y. 1990), I agree that the passage of time could hamper TVA's ability to prepare a defense. R.O.D. at 4. More than four years have elapsed since Guity filed his complaint, and the failure of memory or the dispersal of witnesses as they retire or obtain employment elsewhere could prejudice TVA.

A dismissal for failure to prosecute is with prejudice and thus bars a complainant from reinstituting the case. *Ball v. City of Chicago*, 2 F.3d 752, 753 (7th Cir. 1993). It is considered a harsh sanction, *id.* at 754, and a court should dismiss for failure to prosecute only if it has determined

that a less severe remedy would not be effective. *Ball*, 2 F.3d at 758 and cases there cited.

As the ALJ noted, there is no assurance on this record that Guity will be competent to proceed in any aspect of this case at any time in the near future. For example, setting a cut off date for discovery would be pointless, since Guity apparently remains unable to be deposed. *See* Statement of William Berez, Ph.D., at Par. 4. I therefore agree with the ALJ that sanctions less severe than dismissal are not likely to be effective in this case. R.O.D. at 5. Accordingly, I affirm the ALJ's dismissal recommendation and discuss below the conditions of dismissal.

5. Conditions

The ALJ recommended that, in the interest of judicial finality, Guity's authority to file a motion to reopen the dismissal in this case should expire one year from the date of the Secretary's final decision, and Guity agrees. *See* Guity's Response to Respondent's Response to Order to Show Cause at 2. TVA argues that the period should expire on June 7, 1994, which

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is five years from the date that Guity filed the original complaint. TVA Response to Show Cause Order at 3. In view of the fact that providing a one year period to seek reopening is a means to ameliorate the harsh effect of a dismissal with prejudice, I will adopt the one year period that the ALJ recommended.

The ALJ also recommended that a request to reopen be accompanied by argument and appropriate evidence "showing that the psychologist's declaration of competence was not unduly delayed after the date of recovery." R.O.D. at 5. TVA suggests that Guity also be required to

> demonstrate through a preponderance of the medical evidence that he has been mentally incompetent throughout this proceeding, that his attorney was unable to prosecute this case without his assistance, which was precluded by his incompetency, and that such motion was filed within 30 days of his achieving competency.

TVA Response to Order to Show Cause at 2. Guity does not oppose this requirement, and I will adopt it.

Finally, the ALJ recommended that the request to reopen, if any, be filed with the Secretary through the Office of Administrative Appeals. Since no party objects, I will adopt this condition.

ORDER

1. The complaint is DISMISSED without prejudice and with leave to Complainant to file a motion to reopen within thirty days of Complainant's treating physician or psychologist's declaration of Complainant's competence to litigate the case. The motion shall demonstrate by a preponderance of the medical evidence that Complainant has been mentally incompetent throughout this proceeding, that his attorney was unable to prosecute this case without his assistance, which was precluded by his incompetence, and that such motion was filed within 30

days of his achieving competence.

2. The time for filing such a motion to reopen shall expire one year from the date of this Decision and Order. If no such motion is filed timely, this dismissal shall be with prejudice.

3. Any such motion shall be made to the Secretary and shall be submitted to the Office of Administrative Appeals, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4309, Washington, D.C. 20210.

SO ORDERED.

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ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] In objecting to "reopening," TVA seems to elevate form over substance. After a dismissal without prejudice a complainant may refile a case. Here, the ALJ simply crafted a means to reactivate the case before the ALJ, without requiring the Complainant to restart the entire administrative process.